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No. 85-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LOREN B. MILLER,

Petitioner,

vs.

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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August 15, 1985

129pp

QUESTIONS PRESENTED

1. Whether a non-disclosure order proposed by one party and adopted by the court is improperly issued, under the Federal Rules of Civil Procedure, or is an unconstitutional constraint of a First Amendment right of free speech where:

a. In an action for employment discrimination the order prohibits disclosure, to any person or entity other than counsel or expert witnesses, of any information obtained through discovery concerning an employer's "restructuring program," including a widespread, allegedly discriminatory staff reduction, or the status of former and current employees.

b. The proponent of the order files no pertinent motion and neither makes nor proffers a show of cause, the party subject to the order is given no opportunity to be heard on the matter,

and the court makes no determination regarding either cause for or the proper scope of the order.

2. Whether applicable limitations periods under the Age Discrimination in Employment Act commence upon an employer's delivery of a notice of termination to an employee in the case of an indefinite, ongoing employment relationship.

3. Whether, for purposes of determining when the statute of limitations begins to run, a cause of action under the ADEA alleging a discriminatory termination accrues:

a. When, prior to the employer's decision to take such action, an unofficial and unauthorized "notice" of such action is given to an employee; or

b. When the purported notice of the prospective employment action is not intended as official notice, is not defin-

itive, dispositive or self-executing, but instead is reasonably perceived as informal, conditional and advisiory.

4. Whether the limitations period of the ADEA is tolled by an aggrieved employee's belated awareness of discrimination motivating his discharge, where such employment action is part of a widescale layoff involving a continuing policy and practice of age discrimination and where such discriminatory action involves that employee's replacement by younger personnel.

5. Whether, in determining when the ADEA limitations periods began to run and whether they were affected by equitable modification in granting a summary judgment motion, a trial court errs in failing to take all disputed facts, inferences and questions of credibility in favor of the opponent of the motion.

6. Whether a purported deposition "admission" may foreclose the ultimate question of fact as to when limitations periods began to run under the ADEA.

7. Whether, in determining whether the limitations periods of the ADEA were tolled by an employer's continuing policy and practice of age discrimination:

a. Such tolling effect is dependent upon an allegation in the EEOC charge of a continuing violation extending beyond the employment action affecting the claimant, or beyond the effect thereof;

b. Where the EEOC charge contains such an allegation of a continuing violation, the tolling effect is limited by an entry in the charge regarding the most recent date on which the alleged discrimination occurred;

c. The discrimination cause of action should be dismissed notwithstanding

the fact that the requisite filing was made within the limit so determined.

8. Whether, in dismissing a discrimination claim on statute of limitations grounds, consideration must be given to the tolling or estoppel effect of:

a. An employer's threat of retaliation;

b. An employer's failure to post requisite ADEA notices;

c. An employer's denial of other employment opportunities, as part of a continuing violation, to an employee whose employment is terminated in a staff reduction.

9. Whether, when an EEOC charge has been filed in a timely manner under the rule then applicable, subsequent rulings of this Court preclude consideration of the non-retroactive application of those later rulings and of pertinent precedents.

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IN

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

NO. 85-____

LOREN B. MILLER, Petitioner,

v.

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner Loren B. Miller respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in the proceeding on February 6, 1985.

OPINIONS BELOW

The opinion of the court below, reported at 755 F.2d 20 (2nd Cir. 1985), is reproduced in its entirety as Appendix A,

infra, 1a-10a, together with that court's order denying a petition for rehearing, infra, 11a-12a. The decisions and orders of the United States District Court for the Eastern District of New York which were reviewed by the court below are reproduced as Appendix B, infra, 13a-40a.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on February 6, 1985. A timely petition for rehearing en banc was denied on April 18, 1985. An application for an extension of time in which to file this petition having been timely made and granted, extending such time to August 16, 1985, this petition for certiorari is filed within that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States and 29 U.S.C.§626(d) and §627 are set forth in Appendix D, infra, 46a-47a.

STATEMENT OF THE CASE

From late 1978 or early 1979 until at least mid-1982, and probably until late 1984, ITT Corporation (formerly International Telephone and Telegraph Corporation) carried out a large-scale staff reduction in its corporate world headquarters in New York City, in its European sub-headquarters in Brussels, and among executive personnel in other operations who were carried on the ITT Headquarters payroll. The staff reduction occurred in waves affecting different departments, divisions and groups at different times in that period, and some more than once. In mid-1984 ITT's Director

of Personnel testified in another proceeding that 600 "positions" and over 300 employees had been eliminated in ITT Headquarters. Petitioner believes the number of employees affected may prove to be much larger if involuntary "resignations," early retirements, transfers to operating units preliminary to discharge and demotions are included: in March, 1982 alone ITT's public announcement pointed to 250.

Petitioner has alleged that this staff reduction, at least as it has affected executive-level personnel, has involved a continuing policy and practice of age discrimination. This allegation is based on very limited discovery plus some other sources, which disclose the following: youth-movement statements were made by top ITT management at leastas early as 1979; in 1981 former ITT Personnel Department officials informed petitioner that, in the

case of executives, there had been a departure from the company's prior EEO-sensitive personnel practices and a marked age-tilt was observable in current employment actions; of more than 200 ITT Headquarters executives terminated from 1979 through 1981, 90% were in the protected age group; seven of the eight oldest attorneys in the ITT Headquarters Legal Department were terminated between 1979 and 1982 (excluding instances of death or medical disability), while at least five attorneys age 35 or younger were being added to staff; seven ITTHQ attorneys, ages 45-65, were terminated in 1979, including petitioner; following petitioner's discharge his former superior, age 52, was demoted and reassigned from his position as Area General Counsel (Far East) and another area general (Latin America) was involuntarily retired at age 65, both replaced by an under-40

colleague.

In the first wave of layoffs affecting ITT staff in New York, after thirteen years employment as an attorney with ITT, at age 48, petitioner was among approximately 170 ITT employees whose employment was terminated through dismissal or early retirement in March, 1979. This layoff, as ITT then characterized it, was initially and publicly attributed by ITT to a restructuring of its corporate organization and the prospective relocation of certain operations outside New York City, but a year later was explained to the New York State Division of Human Rights ("NYSDHR") as part of an effort to reduce staff levels. Coincident with the layoff ITT's Chairman and Chief Executive Officer stated publicly that record sales and earnings were expected for ITT in 1979, following a strong income performance in 1978.

The action affecting petitioner was decided upon, in accordance with ITT's personnel procedures, on March 23, 1979. Petitioner was given oral and written notice of his termination by the Personnel Department on March 30, 1979. His active employment ended on March 31, 1979 (disregarding a following period when he remained on pay roll for purposes of receiving severance pay and other benefits).

Petitioner's charge of age discrimination, transcribed almost verbatim from his letter of January 23, 1980, was signed and filed with the Equal Employment Opportunity Commission on January 25, 1980. The charge stated that the termination action was taken "without good cause for such action arising from [his] performance." Nothing in petitioner's personnel file provides a basis for a for-cause termination, arising from his performance reviews or from other

circumstance. ITT's records show the reason for his termination to be "surplus." The charge also asserted that during his employment with ITT petitioner's performance was consistently satisfactory, a statement founded on the fact that all his ITT performance reviews were superior and that the last of them was excellent (8 on a scale of 9). The latter assertion has provoked a certain degree of dispute: even while attributing petitioner's layoff to a staff reduction conducted for economy reasons ITT, in its initial comments, pointed to prior dissatisfaction with petitioner's performance as the reason for his selection.

The text of petitioner's charge, taken from his letter, stated that in its termination of other ITTHQ employees, at the same time as petitioner or in subsequent months in 1979, ITT had followed a pattern or practice of age discrimination. In a box

on the EEOC form calling for petitioner to state the "date most recent or continuing discrimination took place," the date April 1, 1979 was entered; this was the same date as was given (erroneously) in the text for petitioner's termination (actually March 31, 1979).

Petitioner's complaint filed in the Eastern District of New York on March 30, 1981 stated three causes of action: the principal claim was for willfully discriminating against petitioner because of his age by denying promotion to, discharging and failing to reemploy him, as part of a staff reduction program reflecting a pattern of willful age discrimination; a claim under New York law arising from the same and other associated actions of ITT; and a claim for additional severance pay allegedly owed to petitioner under applicable ITT plans. A jury trial was demanded.

ITT's motion to dismiss or for summary judgment, filed August 27, 1982, sought to bar petitioner's federal claims on a number of jurisdictional grounds, principally: that his claim for discriminatory refusal to promote or rehire could not be heard because no corresponding allegation was made in his EEOC charge; and that more than the statutory periods, following his discharge, had elapsed when petitioner filed his EEOC charge and this court action. The motion was initially heard, on affidavits and briefs, before a magistrate whose report recommended dismissal of all causes of action. Objections to that report being timely filed, on November 8, 1983 in a de novo determination the district court granted respondent's motion, finding that petitioner was notified of his termination and knew of respondent's discriminatory motivation seven months prior to the effect-

ive date of termination, that the limitations period for a non-willful ADEA violation had elapsed when this action was brought, and that the cause of action for a willful violation was barred by the untimely filing of the EEOC charge.

ITT had contended that on several occasions, beginning over thirteen months before the event, petitioner was made aware of the fact that he would be terminated. Rejecting petitioner's several factual contentions, on the basis of ITT's affidavits and certain statements in petitioner's deposition testimony the district court found: that notice of termination, effective to start ADEA limitations periods running, was given to petitioner by his department head, ITT's general counsel, on August 28, 1978; that such notice was authorized by ITT by virtue of the personnel department's prior awareness of it in February, 1978; that

none of the equitable tolling factors asserted by petitioner affected the limitations periods; and that, measured from the notice of termination so found, petitioner's EEOC charge was filed more than seven months late. The equitable factors asserted by petitioner included:

- a continuing violation in ITT's policy and practice of discrimination in its staff reduction from 1978-79 to 1982;

- a continuing violation in ITT's refusal to consider petitioner for other positions for which he was qualified, notably a position with a subsidiary company for which he applied in January, 1980;

- petitioner's excusably belated awareness of the discriminatory motive for his termination;

- a threat of retaliation occurring, according to petitioner, after March 31, 1979 or, according to ITT, shortly before

that date;

- ITT's failure to post requisite ADEA notices.

In denying petitioner's motion for reconsideration the district court also declined to consider the non-retroactive application of this Court's rulings regarding the determination of limitations periods in such cases.

Pursuant to its statement at a pre-trial conference that it would seek an order of confidentiality, ITT on June 17, 1982 informally submitted the proposed text of such an order under a covering letter requesting the presiding magistrate's signature. Slightly revised by the magistrate the order of confidentiality was so ordered on June 29, 1982. No motion was filed by ITT. No opportunity was given to petitioner to be heard on the proposed text. No showing of good cause for the order was made or attempted by ITT, either general-

ly or as to its particular terms. No determination was made by the court regarding the order's necessity, the scope of matter covered or potential recipients of information excluded from permitted disclosure. The order as issued applies to information gained through discovery which concerns ITT's restructuring program or the employment status of any ITT employee and bars disclosure to every person and entity, excepting attorneys or experts engaged in this proceeding. The district court found this order to be not clearly erroneous or contrary to law.

Making several determinations at variance with or additional to those made by the district court, the court of appeals affirmed the decision granting summary judgment and the order denying vacature of the protective order.

1. THE DECISION BELOW CONFLICTS WITH RECENT DECISIONS OF THIS COURT REGARDING COMMENCEMENT OF LIMITATIONS PERIODS.

The district court ruled that petitioner received a notice of termination from his department head, Howard Aibel, on August 28, 1978, that such notice was effective to start ADEA limitations periods running, and that cosequently the limitations period had expired more than seven months prior to the filing of petitioner's EEOC charge. On appeal the court below encountered two questions arising from the facts of this case: (a) whether an ostensible notice of termination which is not made or authorized by the employer and which does not reflect an employment decision by the employer can trigger the limitations period; (b) whether a statement which is not conclusive, dispositive or self-executing, or which could reasonably be understood as

tentative, contingent, informal and advisory, can have such triggering effect.

The decisions below treated the jurisdictional issue as one governed by this Court's rulings in Delaware State College v. Ricks, 449 U.S. 250 (1980)(Title VII and §1981 suit) and Chardon v. Fernandez, 454 U.S. 6 (1981)(§1983 suit). In dismissing petitioner's action, on the basis of their finding that a termination notice, sufficient to meet the Ricks test, was given by petitioner's department head on August 28, 1978, the courts below disregarded this Court's holdings as to what constitutes a discriminatory employment action, the commission of which starts the applicable limitations periods running, and instead looked to an event which is clearly in conflict with those holdings. At the same time the courts below failed to address in a forthright fashion the two

questions stated above.

A. In Ricks, this Court ruled that the limitations periods commence at the time an employment decision is made and communicated to the employee affected, because these two events, decision and notice, taken together comprise the alleged unlawful employment practice. 449 U.S. at 259. In Chardon, this holding was applied to a simple act of employment termination. 454 U.S. at 8. According to these decisions the focus in the first instance must be on the employer's final decision.

The decisions below have not only disregarded the critical factor of the employer's decision, but have strained to do so. The focus of their attention has instead been on the event of notification to the employee of his impending termination: the "300-day period, in the case of a discriminatory discharge, starts running on the

date when an employee receives a definite notice of termination, not upon his discharge." 755 F.2d at 23.

With one exception, the court of appeals referred to a decision only once; and it is clear in that instance that its reference is not to ITT's decision, but rather to the decision of petitioner's department head, i.e., to the August 28, 1978 "notice from Aibel that [petitioner] would, absent exceptional circumstances, be removed from the payroll on April 1, 1979." Id. at 24. The one exception appears obliquely, without explicit reference to the ITT decision which is the essential element in the employment action complained of: "On March 23, 1979, the proposed termination was approved . ." Id. at 23. This event, which must control the limitations question, has been ignored in the decisions below.

With their focus on the event of notifi-

cation rather than on the employer's decision, the decisions below were forced to address in some fashion petitioner's contention that the Aibel "notice," to meet the Ricks/Chardon test, must have been authorized by ITT, and that it was not. That any proposed employment action required the prior approval of the ITT Director of Personnel, under ITT's written personnel directive, has not been questioned.

Neither decision found, as a matter of fact or of law, that the Aibel "notice" was approved or authorized when given; indeed, as noted, such approval was seen to occur seven months later, on the eve of ITT's formal, written notice to petitioner. Instead, the district court found what can be characterized as a predisposition, six months in advance, to ratify Aibel's subsequent decision: ". . .Mr. Aibel's Memorandum to the file in reference to the

plaintiff, dated February 24, 1978 would support the conclusion that the Personnel Department was aware of the notification [given to petitioner on August 28, 1978] and would ratify personnel decisions made by the General Counsel affecting members of his staff." (Emphasis added.)

The court of appeals was more obscure: "ITT's personnel department was aware of Aibel's August 28th action . . ." Id. at 24. The record provides no direct indication, but some basis from which to infer, that at least one junior member of the Personnel Department was aware of Aibel's August 28th statement after the fact. Whether that inference is made, whether such knowledge is imputed to the Director of Personnel, whether there is sufficient reason to conclude that the latter's imputed knowledge signified his approval of Aibel's statement as a notice given by ITT, whe-

ther such approval would operate retroactively to the August 28 date, and whether any discriminatory element in ITT's later action would relate back to and affect the Aibel "notice" -- none of these questions was considered.

If reference to a prior anticipation of Aibel's future decision was intended, then the court below, like the district court, was propounding, albeit in obscure fashion, a rule which was incompatible with this Court's reasoning in Ricks and Chardon, viz., that the events which trigger the limitations periods are a final decision of the employer and the employee's awareness (actual or imputed) of that decision.

B. In both Ricks and Chardon no question was presented as to the clarity of the respective notices, their official character or (putting aside the pending grievance) their finality. In this case peti-

tioner has contended that his discussion with Aibel on August 28, 1978 did not constitute termination under the Ricks/Chardon rule because, apart from the lack of authorization for such notice: Aibel's statement was not intended as an official and final notice; in the context of Aibel's previous and current effort to induce petitioner to relocate outside his department, his statement was reasonably understood as informal, tentative and advisory; being contingent upon an anticipated event (cost reduction measures in 1979), subject to further determinatation and not self-executing, Aibel's statement was not notice of a final decision, notwithstanding the fact that it referred to a specific date on which the prospective termination, if implemented, was to occur.

Neither of the courts below addressed these contentions directly, either analy-

tically or in conclusory fashion. Neither quoted or referred to the only contemporaneous account of the August 28 meeting between Aibel and petitioner, contained in Aibel's memorandum to file date September 14, 1978. Instead, both courts looked to a brief excerpt from petitioner's deposition, in which he acknowledged that Aibel had stated the purpose of the meeting was to advise petitioner that his active employment (inaccurately referred to as "period on the payroll") would end April 1, 1979. The court of appeals characterized this as an "admission," an admission of what was not referred to in petitioner's testimony, viz., that he had received "notice" from Aibel. That admission was taken as sufficient to foreclose all other questions as to whether the event to which Ricks and Chardon would look, the communication to petitioner of the company's offi-

cial and final decision to terminate, had occurred.

Given the absence of any decision by ITT (pursuant to its established procedures or otherwise) or of any authorization (or even prior awareness) of the Aibel "notice," and given the ambiguity of Aibel's statement as official and final notice, the determination that the limitations periods began to run on August 28, 1978 is so at odds with the mode of analysis employed in Ricks and Chardon and with the rule there adopted as to warrant the grant of certiorari. As this case and Aronsen v. Crown Zellerbach, 662 F.2d 584 (9th Cir. 1981), illustrate, questions regarding the definition of the point from which limitations periods run on discrimination claims will recur and the careful application of Ricks and Chardon is a matter of great concern to many claimants.

In the instant case, it should be noted, the fact that petitioner's EEOC charge was filed on the 301st day following ITT's notice of March 30, 1979 does not render the preceding questions moot or of no consequence, for the following reasons: if the fact that the EEOC took January 23, 1980 as its intake date (as discussed infra) should be taken as controlling the limitations question, the jurisdictional basis of this claim will be established; or if attention focuses on the later notice date, there may be a change in the effect given to any of the several tolling factors which have been asserted, or even in the resolution of the non-retroactivity question; and in any event there will be a vital change in the influence of the lower courts' determination of the limitations question on petitioner's pending NYSDHR claim.

2. THE DECISIONS BELOW, BY FORECLOSING QUESTIONS OF FACT ON A SUMMARY JUDGMENT MOTION, CONFLICT WITH A RECENT DECISION OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT, CONFLICT WITH PERTINENT DECISIONS OF THIS COURT AND VIOLATE APPLICABLE PROCEDURES UNDER F.R.C.P. RULE 56.

Neither of the decisions below wasted words on a statement of the procedure and standard to be observed in the disposition of a summary judgment motion. Whether the courts below willfuly disregarded the long-established rules regarding the judicial function in this situation or had some reason to believe those rules had been changed, or were not applicable in this case, one cannot judge from their silence. Their practices can be observed, however: in a case where a jury trial was demanded, petitioner was denied a hearing; petitioner's protest that the issues raised by ITT's motion were not ripe for decision was ignored; disputed inferences were re-

solved in favor of respondent; factual conclusions were drawn without support in the record, and supposition substituted for fact; and petitioner's credibility was assessed, unfavorably.

Petitioner submits that in its decision the court below has so far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned such a departure by the district court, as to call for an exercise of this Court's power of supervision; and, further, that the ruling below, that petitioner's purported admission foreclosed any factual question as to the character and effect of the Aibel "notice," conflicts with the decisions of this Court; and, again, that the decision below, in affirming the dismissal of petitioner's claim, conflicts with the Ninth Circuit's disposition of a case in essentially the same posture, in Aronsen v.

Crown Zellerbach, supra.

A. In Ricks, when the college's final decision to deny tenure and to offer a terminal contract was made known to Ricks was treated as a question of fact; the district court's determination was found to be not clearly erroneous. 449 U.S. at 262; and Justice Stewart's dissent, n. 1, at 263.

Aronsen v. Crown Zellerbach, supra, presented a factual situation which in general terms was very similar to this one. The several differences weigh in petitioner's favor in comparing the results: Aronsen did no regular work for the company for a full year before he was officially terminated; Aronsen was initially offered the choice of accepting a demotion, whereas petitioner was offered, in February, 1978, a level transfer within his department; more important, the question of when the decision to terminate was made or whether

the several notices were authorized was apparently not raised and was not addressed by the Ninth Circuit. The district court's grant of summary judgment, based on its determination that there was no dispute as to "controlling facts," was reversed there.

The Aronsen decision states familiar and long-established principles governing the disposition of a summary judgment motion: there must be no issue of any material fact and the moving party must demonstrate the right to judgment as a matter of law in the context of undisputed facts; in determining whether a material factual dispute exists, facts and inferences must be viewed most favorably to the non-moving party; neither an appellate court nor a trial court are permitted to weigh the evidence, pass upon credibility, or speculate as to the ultimate findings of fact; a determin-

ation that a result other than the district court's conclusion is possible under the facts and applicable law compels a reversal and remand. The decisions of both courts below incorporate findings on numerous disputed points which conflict with all the principles stated in Aronsen.

Among the principal factual issues presented by ITT's motion are the following:

-- Whether ITT made a final decision to terminate prior to March 23, 1979. The record contains nothing which even suggests such a decision.

-- Whether the Personnel Department (more precisely, the Director of Personnel) was disposed to exempt any department, or specifically the general counsel, from company rules and procedures regarding approval of employment actions.

-- Whether petitioner's department head, the company's chief attorney, was disposed

to take action in conflict with such rules and procedures.

-- Whether the Personnel Department (or, more particularly, the Director of Personnel) was aware, in February, 1978, of an action to be taken by Aibel at an indeterminate future date.

-- Whether Aibel intended his August 28 "notice" as an employment action of the company.

-- Whether petitioner understood, or should have understood, that the Aibel "notice" was such action, in view of:

- The background, context and manner of Aibel's statement;

- The contingent nature of Aibel's statement, predicated on a foreseen cost reduction program in the company in the following year;

- Aibel's statement that the prospective termination was not irrevocable, see

Aronsen, supra, at 595, particularly when this is coupled with the sudden demise, less than four weeks after the August 28th meeting, of the colleague who was expected to assume petitioner's functions.

-- Whether the purported August, 1978 termination decision had any basis as a for-cause discharge or whether, as the district court found, it was motivated by age discrimination; whether petitioner perceived such decisional motive in either case; and whether such perception had any relationship with his requisite awareness that a decision to discharge had been reached by ITT.

-- Whether the threat of retaliation by petitioner's superior-once-removed, Associate General Counsel H. A. Steinke, was made to petitioner before or after March 31, 1979, and whether petitioner was thereby made aware of ITT's discriminatory act.

-- Whether petitioner excusably did not become aware of ITT's policy and practice of age discrimination in its ongoing staff reduction program until after his termination on March 30, 1979.

B. The principles set forth by the Ninth Circuit as governing the disposition of a summary judgment motion have been stated on numerous occasions, along with corollary principles of common tenor, in decisions of the Second Circuit. An adequate sample of them was cited by petitioner in his brief on appeal and in his Rule 59(e) motion to the district court. E.g., EEOC v. Home Insurance Co., 672 F.2d 252, 256-57 (1982); Subin v. Goldsmith, 224 F.2d 753, 758 (1955; Frank, C.J.), citing in turn Bozant v. Bank of New York, 156 F.2d 787, 790 (L. Hand, J.); Perma Research and Development Co. v. Singer Co., 410 F.2d 572, 578 (1969); Klein v. Auchincloss,

Parker & Redpath, 436 F.2d 339, 341 (1971); Heyman v. Com. & Ind. Ins. Co., 524 F.2d 1317, 1320 (1975); Empire Electronics Co. v. U.S., 311 F.2d 175 (1962); Preston v. U.S. Trust Co., 394 F.2d 456 (1967), cert. denied, 393 U.S. 1019; Friedman v. Meyers, 482 F.2d 435 (1973); Friedlander v. Feinberg, 369 F. Supp. 917 (S.D.N.Y. 1974), aff'd, 508 F.2d 836 (1975).

Neither of the courts below indicated that these precedents do not state the law applicable to this case or offered any explanation of how their decisions conform to the principles laid down therein. Assuming that our system of law still requires a reasoned statement of judgments reached, as well as the consistent application of rules of law, petitioner submits that the extensive failure of the courts below, in both regards, should alone provide ample occasion for the grant of certiorari for

the exercise of this Court's supervisory power.

C. The court below, having characterized petitioner's deposition testimony as an admission regarding the Aibel "notice," stated further that this "sworn admission, which could not later be contradicted for the purpose of creating an issue of fact, see Perma Research and Development Co. v. Singer Co., 410 F.2d 572, 578 (2nd Cir. 1969), established that the running of the statute of limitations period was triggered on August 28th." 755 F.2d at 24. Preliminarily, the reference to a later contradiction is an attempted misdirection, since petitioner has not departed from his testimony -- indeed, he has no impulse to do so, since it is not dispositive.

More important, the court's proposition is not controlling or even apt. Its citation of Perma Research is entirely distort-

ed, as a reading of the cited page will demonstrate. Responding to that citation, petitioner has observed: "It cannot be said that plaintiff has sought to raise an issue of fact simply by submitting an affidavit contradicting his sworn testimony; or that the decisions below and here have merely screened out sham issues of fact; or that plaintiff is vaguely hoping that something will come up at trial." Similarly, the cases cited in Perma Research confound the court's point, most notably Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 627 (1944); see also 6 Moore, Federal Practice §56.22(1) at 2814 (2d ed. 1965) and Second Circuit cases cited there; see also Whitaker v. Coleman, 115 F.2d 305, 306 (5th Cir. 1940), cited in Sartor.

Sartor, in which this Court granted certiorari because of the importance of questions raised under the summary judg-

ment rule, provides support for this petition as well.

D. In at least two instances petitioner's credibility was assessed negatively by the district court:

-- That court found petitioner's assertion of belated awareness of age discrimination on ITT's part to be "incredible" in light of a supposed contradiction between his affidavit and his earlier deposition testimony. With this finding the door was closed on consideration of two issues relating to awareness, concerning timing and the kind of discrimination at issue, which are discussed infra.

-- To petitioner's argument that no decision to discharge had been made on August 28, 1978, because there was no for-cause predicate for such action by the company, the district court responded: "To assert that he was unaware that his ter-

mination was attributable to his performance is disingenuous" (citing ITT's documents). In plain English, petitioner's assertion of fact and inference was found to be not merely incredible, but dishonest. On the other hand, the court also found that petitioner knew at the same time that the action taken in August, 1978 was motivated by age discrimination, a factual assertion which both parties dispute. That court's positions were contradictory; petitioner's are not. Worse, the court did not understand the initial point, or sought to squelch it with distorted or evasive words.

Except for its implied reference to a contradictory assertion concerning the Aibel "notice," the decision below skirted any direct address of petitioner's credibility. Neither did it address the district court's handling of the matter. Whe-

ther the district court's judgment, being thus affirmed, was purged of prejudice may be doubted, especially in view of the posture of the court below, in its treatment of factual issues. What is clear is that the district court preempted the function of the trier of fact, in this case the jury, and that this error remains uncorrected.

3. THE DECISION BELOW, IN REFUSING TO CONSIDER THE NON-RETROACTIVE APPLICATION OF THIS COURT'S DECISIONS, CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS.

The filing of petitioner's EEOC charge was timely under the rule then applicable in the Second Circuit, see Egleston v. State University at Geneseo, 535 F.2d 756 (2nd Cir. 1976) and in several other circuits. This point has not been disputed by respondent or by the courts below; rather, it has been ignored. That filing continued to be timely, and gave rise to no statute of limitations question, until

this Court rendered its decision in Ricks, supra, almost eleven months later.

Petitioner urged both of the courts below to consider the non-retroactive application of the Ricks/Chardon rule, citing persuasive reasons presented in decisions of other courts of appeals. The sole answer of the court below was that "the rulings in Ricks and Chardon . . . are retroactive. The Supreme Court so applied them in those cases." 755 F.2d at 24. The court was obviously undeterred in this line of thought by the fact that the issue of non-retroactive application was not presented to or considered by this Court in those cases.

That this was no answer at all was shown in Chardon on remand to the First Circuit, where that court, through Judge Campbell's decision, weighed carefully and at length the several considerations

which it regarded as controlling the question. Fernandez v. Chardon, 681 F.2d 42 (1st Cir. 1982), limited cert. granted, 459 U.S. 987 (1982). Manifestly the First Circuit did not consider that this Court's decision in that case had precluded further consideration of the non-retroactivity question. Instead, that court looked, expectably, to the criteria set forth by this Court by Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) -- as the court below did not.

In Chardon the First Circuit found that there was no sufficient reason not to apply this Court's decision retroactively. There is a major distinction between that case and this, however: in that case there was no prior rule governing the limitation periods' measurement, and thus no later change in a rule upon which the claimants had relied in filing their claims; here, in con-

trast, the applicable rule which petitioner had relied on was overruled and superseded by a new principle of law, with the result that a filing which was clearly timely became untimely, absent any saving factor.

The decision below conflicts even more directly with that of the Ninth Circuit in Wiltshire v. Standard Oil Co. of Calif., 652 F.2d 837 (1981)(on rehearing en banc), an employment discharge case potentially involving the question of whether the claim was time-barred as a result of this Court's subsequent interpretation of the pertinent statutory provision, in Mohasco Corp. v. Silver, 447 U.S. 807 (1980). The Ninth Circuit determined that it must first decide whether that rule disposed of the case before it. 652 F.2d at 840. Considering the criteria set forth in Huson, and also looking for precedent to the Second Cir-

cuit's decision in DeMatteis v. Eastman Kodak Co., 520 F.2d 409 (1975), the Ninth Circuit decided that Mohasco should not be applied retroactively in that case. Subsequently the Sixth Circuit, looking directly at Ricks, followed Wiltshire in Hall v. Ledex, Inc., 669 F.2d 397, 399 (1982).

The result below, in its departure from Huson and its conflict with other decisions, in itself provides sufficient occasion for the grant of certiorari. Petitioner submits that, additionally, whatever the result might be upon consideration of the Huson/DeMatteis criteria in the context of this case, the lower court's refusal to address the issue is such a breach of judicial procedure as to call for an exercise of this Court's power of supervision.

4. THE DECISION BELOW, IN REJECTING SEVERAL ASSERTED TOLLING FACTORS, RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING THE STATUTE OF LIMITATIONS FOR EMPLOYMENT CASES.

If the preceding point is not reached or is not dispositive, and if the EEOC intake date of January 23, 1980, belatedly discovered,[1/] is not taken as controlling the limitations question, this case turns on whether any of several factors asserted by petitioner is given a tolling effect. While all present substantial questions of law, petitioner believes that at least three are of such character as to merit certiorari. Of these, two also involve serious questions as to the manner in which the courts below handled factual issues.

[1/] Less than a week prior to the district court's denial of petitioner's Rule 59(e) motion petitioner was informed of this fact by the regional attorney of the EEOC New York office. Nothing is in the record on the point and apparently no notice of it was taken by the court below. See Appellant's Brief submitted below, n. 2 at p. 1.

A. Petitioner has argued that, whenever the statute of limitations began to run, it was tolled by ITT's continuing violation consisting of a policy and practice of age discrimination in its staff reduction program, commencing prior to his termination and continuing long after it. The courts below answered this argument in two ways.

In the face of the plain meaning of the text of petitioner's EEOC charge the district court, like the magistrate's report, at one point seemed to focus only on the allegation that the discharge of other employees occurred prior to petitioner's. As is clear in the charge's text, petitioner referred to a large number of terminations "in subsequent months" and to ITT's "actions in 1979" in which a pattern or practice of age discrimination was evident. If it is material, in his letter of Febru-

ary 5, 1981 to the NYSDHR, after correcting the date of termination from April 1 to March 31, 1979, petitioner extended his allegation regarding the staff reduction to run through 1980 and into 1981.

The district court's decision also noted that in the space on the charge captioned "Date most recent or continuing discrimination took place" petitioner stated April 1, 1979." The court of appeals focused on that point, ruling that petitioner "did not assert in his EEOC complaint as the basis of his action a continuing violation extending beyond his discharge; on the contrary, he listed 'April 1, 1979' as the date of the most recent violation in his signed charge filed with the EEOC. Since, according to his own filed claim, the conduct that injured him occurred at the time when he was discharged, he cannot now allege later terminations of others as a

continuing violation as to him, and the existence of terminations post-dating his own would not serve to delay the running of the statutory period as to him." 755 F.2d at 25. The court earlier stated that a federal court claim of age discrimination, if timely filed with the EEOC, must be "within the scope of the EEOC investigation reasonably expected to grow out of that claim," citing Smith v. American President Lines, Ltd., 571 F.2d 102, 107 n. 10 (2nd Cir. 1978) and Thomas v. Resort Health Related Facility, 539 F. Supp. 630, 642 (E.D.N.Y. 1982).

Before considering the validity of the limiting rule stated, it is necessary to observe that the court below was not scrupulous in applying that rule. Assuming the tolling effect of petitioner's allegation of a continuing violation is cut short by the date reference in the charge, still

the tolling effect is sufficient to sustain petitioner's claim, whether the limitation periods are deemed to run from August 28, 1978 or from March 30, 1979, since the filing of the EEOC charge was timely as measured from April 1, 1979. Thus, dismissal of this claim on the basis of that rule is erroneous as a matter of law.

The rule adopted by the court below is one of major significance, with implications which extend far beyond the facts of this case. Petitioner submits that it is erroneous in concept. The doctrine of continuing violation is a rule of equitable tolling, applicable in court proceedings to determine whether a defendant is entitled to invoke the statute of limitations. A continuing violation may be viewed as a conscious waiver of limittions period protection or as a factor which negates the considerations which underlie the law's

policy of repose, see EEOC v. Home Insurance Co., 553 F. Supp. 704, 712 (S.D.N.Y. 1982). As an accretion upon the requirement of a timely filing of an EEOC charge the rule adopted by the court below has no support in statute or logic.

Finally, the court of appeals' application of its rule as to the expectable scope of the EEOC investigation is vitiated by that court's own citations. In Smith and Thomas, supra, the rule was applied expansively in considering the EEOC charge, not, as here, in a manner which suppresses a validating feature of a charge by giving sole emphasis to a limiting feature. Indeed, in Thomas the text of the charge was taken as curing a defect in the response to the printed form, 539 F. Supp. at 642, and that case's holding is directly opposite to the holding in this case. And cf. cases cited in Smith, 571 F.2d at 107,

n. 10, expecially Sanchez v. Standard Brands, Inc., 431 F.2d 455, 466-67 (5th Cir. 1970).

The court also declared unequivocably that petitioner, being injured at the time of his discharge (presumably referring to the Aibel "notice"), cannot allege later terminations of others as a continuing violation as to himself. This pronouncement necessarily contemplated later terminations which were part of a common staff reduction program, which affected petitioner as well, and which was tainted throughout by a policy and practice of age discrimination. Petitioner believes the concept expressed by the court below is one of major consequence in EEO law, is seriously flawed, and in its appearance here was prejudicial to his claim. However, two sentences earlier the court pointedly stated that it was not reaching this issue. Consequent-

ly, petitioner cannot present this point as an occasion for certiorari. However, if the point should be considered by this Court, petitioner urgently requests to be heard.

B. Petitioner has contended that his excusably belated awareness of the discriminatory nature of the employment action affecting him tolled the limitations periods until that feature of ITT's action became known to him. The findings of the courts below, in rejecting this contention, present an important issue as to what kind of awareness will serve to produce the tolling effect.

Petitioner's contention was based on a rule set forth in Reeb v. Economic Opportunity Atlanta, Inc., 516 F.2d 924, 930 (5th Cir. 1975), adopted there as an alternative to a rule of estoppel deriving from the employer's conduct. This rule

was expressly adopted in the magistrate's report below, citing Mohasco Corp. v. Silver, supra, at 818 n. 22, and was tacitly followed by the district court. The treatment of the rule by the court below was also positive, although more tentative and guarded, as an extension of the tolling "rule" of Smith v. American President Lines, supra, at 209.

The rule invoked was held inapplicable in this case by both courts below because petitioner had testified to his awareness, as early as June, 1977, "of ITT age discrimination," 755 F.2d at 26 -- more precisely, of age discrimination affecting promotions. The question presented by this holding is whether, for purposes of the Reeb rule, awareness of discrimination in promotion has the same effect as awareness of discrimination in a claimant's termination, as it affects him individual-

ly, and whether either has the same effect as awareness of a policy and practice of discrimination manifested through a wide-scale staff reduction of which his termination was a part. By focusing on petitioner's testimony concerning promotion as dispositive of his claim relating to discharge, the decisions below either suppressed the question or tacitly answered it affirmatively.

As to the first factor, awareness of discrimination affecting promotion, petitioner's deposition testimony is clear and uncontradicted; moreover, although petitioner's complaint alleged a discriminatory failure to promote, his failure to include this claim in his EEOC charge is, concededly, sufficient to make that claim defunct. Petitioner submits, however, that his June, 1977 perception of discrimination in promotion cannot properly dis-

pose of a claim as to his termination, whether the latter occurred more than a year later, at the time of the Aibel "notice," or almost two years later, at the effective date of his discharge. This is all the more so given the fact that petitioner's prospective replacement in August, 1978 was a colleague who was a close contemporary, see Pace v. Southern Ry. System, 701 F.2d 1383, 1390 (11th Cir. 1983); Everett v. Comsat, 33 F.E.P. Cases 793 (D.D.C. 1983), almost equal in tenure of service, with closely comparable work experience.

Although the district court was also content to refer simply to petitioner's awareness of "age discrimination," in noting also petitioner's testimony that he was aware of discrimination in his termination at or about the time he was terminated (referring to March 31, 1979) the

court approached the second of the three factors identified above. In view of ITT's observation that he was then made aware of discrimination affecting him by Steinke's threat of retaliation, petitioner cannot gainsay the effect of his testimony. However the district court was not disposed to examine whether "at or about" meant before or after the March 30 notice date; and, notwithstanding the assertion of ITT counsel, in oral argument before the court below, that Steinke's statement was made prior to that date, petitioner has offered to prove, by extrinsic evidence, that the statement was made after that date.

Petitioner's assertion that he first became aware of the discriminatory nature of ITT's staff reduction program in late 1979, when he became aware of the scope and character of that program, or in January, 1980 when he learned of youth-move-

ment statements, has not been disputed. It was this belated awareness which gave him sufficient basis for the charge filed with the EEOC. (Indeed, as petitioner has previously observed, much of what he now knows about the staff reduction program was learned more than a year later, in 1981.) What would have been learned by the EEOC had it responded energetically to petitioner's charge in 1980 is a matter of conjecture. However, the question the courts below should have addressed is whether petitioner's excusably belated awareness, which prompted him to file in January, 1980, is sufficient to toll the statute of limitations under the Reeb rule.

C. If Steinke's threat of retaliation was made after March 30, 1979, then the tolling effect of that statement would operate, Aronsen v. Crown Zellerbach, supra, at 595, sufficiently whether the limita-

tions periods are deemed to run from that date or from August 28, 1978. If it is established that Steinke'sstatement was made before March 31, 1979, the question remains to be determined whether it had the effect of inhibiting petitioner from filing his EEOC charge, i.e., whether the tolling effect of the statement continued to operate for some period subsequently. None of this was considered to raise a material issue bearing on the summary judgment motion.

D. The court below rejected petitioner's assertion of a continuing violation in ITT's failure to rehire him within the statutory period, on the ground that petitioner failed to present such a claim to the EEOC, so that it was not within the scope of EEOC investigation prompted by the charge. Finding that the claims are separable, the court also ruled that the

new claim would not toll the limitations periods. 755 F.2d at 25.

If the two actions, termination and failure to rehire, are indeed separate in this case, then petitioner's contention has no force. However, presenting evidence that the subsidiaries' legal departments acted under the central direction of the ITT Headquarters Legal Department with respect to major employment actions, petitioner has contended that ITT's action in selecting him for layoff as part of the March, 1979 staff reduction and its action in failing to consider him for the new opening ten months later were not isolated events, but rather were both manifestations of the continuing violation which permeated ITT's restructuring program from 1978-79 until at least 1982. Thus, his allegations as to both events all address the same course of discrimination. Fur-

thermore, since petitioner's EEOC charge alleged a continuing violation running until the charge's filing, ITT's subsequent action was reasonably related to the charge or could have been expected to grow out of it.

In support of this contention petitioner cited the Second Circuit's decision in Almendral v. N. Y. State Office of Mental Health, 743 F.2d 963 (1984), as well as Cox v. United States Gypsum Co., 409 F.2d 289 (7th Cir. 1969). And see Kirkland v. Buffalo Bd. of Education, 622 F.2d 1066, 1068 (2nd Cir. 1980). In disposing of the point the decision below did not refer to the court's recent ruling. Whether or not the specific issue raised commands this Court's attention, the failure of the court below to provide a reasoned statement of why its earlier ruling does not govern this case warrants the grant of certiorari,

especially when considered in conjuction with other lapses in judicial proceeding cited.

E. Petitioner argued before the courts below that ITT's failure to comply with the notice-posting requirement of §627 of the ADEA effected a waiver of, or estopped ITT from raising, the statute of limitations issue. Neither of the courts below responded to the issue.[2/]

Whether notices were in fact posted, or whether petitioner had actual knowledge of the ADEA's provisions, are questions which were not reached in the disposition of the summary judgment motion. If there was an unarticulated presumption of petitioner's

[2/] The court of appeals' discussion of continuing violation opens with a vagrant observation that petitioner has not alleged a lack of awareness of his ADEA rights. 755 F.2d at 24-25. While this may have been intended to relate to the posting issue, it conspicuously does not respond to petitioner's contention, based on lower court precedents.

awareness, petitioner expressly addressed this in his contention that either ITT's failure to comply with §627 bars consideration of non-compliance with §626(d), Franci v. AVCO, Civ. B-77-22, Mem. Dec'n (D. Ct. Apr. 1978), or requires proof of petitioner's actual knowledge, Pirone v. Home Insurance Co., 507 F. Supp. 1287 (S.D.N.Y. 1981).

The failure of the court below to apply the Franci and Pirone holdings -- holdings of two lower courts within its own circuit -- to petitioner has resulted in a denial of a uniform application of law. Its deliberate failure to address the issue is a departure from acceptable procedure which warrants the grant of certiorari.

5. THE DECISIONS BELOW, IN REFUSING TO VACATE A NON-DISCLOSURE ORDER, VIOLATE APPLICABLE PROCEDURAL AND SUBSTANTIVE RULES AND FAIL TO PROVIDE A REASONED JUSTIFICATION FOR SUCH REFUSAL.

ITT's proposed text of a protective order of confidentiality, informally submitted to and slightly revised by a magistrate in June, 1982, reproduced as Appendix C, infra, was found by the district court not to be clearly erroneous or contrary to law, without other comment. This ruling was affirmed by the court below without discussion, other than the characterization of the order as one "which barred disclosure by Miller of personnel files obtained during discovery." 755 F.2d at 26.

Whether that description was even minimally accurate is conjectural, since, as petitioner observed, the only personnel file he had obtained or was likely to obtain was his own. That the characterization was otherwise inadequate and inaccurate is revealed by the most casual perusal of the order's text, which by its terms applies to: (a) ITT's "restructuring pro-

gram"; (b) any information concerning the status of current or former employees of ITT, other than petitioner.

A. Petitioner has argued that the order is an improper constraint upon his First Amendment right of free speech in two separate respects: the scope of the information covered is too broad, encompassing diverse and substantial information regarding ITT's restructuring program generally and its employment practices specifically without any compelling necessity to justify the constraint; the scope of potential recipients of information barred by the order is too broad, encompassing other parties to this proceeding, other litigants and concerned governmental agencies (e.g., the NYSDHR if petitioner pursues his state claim there), as well as the EEO bar and the general public.

B. Petitioner has also protested that

the order is procedurally defective because, among other reasons: no requisite motion was filed by ITT; no showing of good cause for the order was made or attempted by ITT; no opportunity to be heard was afforded to petitioner; no finding of need was made by the magistrate issuing the order -- or, now, by either of the courts below.

In support of both classes of objection petitioner offered numerous pertinent citations to the courts below, including In re Halkin, 598 F.2d 176 (D.C. Cir. 1979). ITT countered with Seattle Times Co. v. Rhinehart, 104 S. Ct. 2199 (1984)(concerning a state, not federal, proceeding). The court below evaded all discussion of the principles of law presented.

Petitioner has just discovered this Court's decision in Gulf Oil Co. v. Bernard, 452 U.S. 89 (1981). That decision

is not in point with this case in every respect -- e.g., it concerned a true class action, whereas this proceeding, being under the ADEA, could not have that status--but the similarities, particularly the procedural deficiencies, are so strong as to make the grant of certiorari compelling here. Indeed, the absence of any attempted saving device makes the First Amendment issue even more prominent in this case.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit in this proceeding.

Respectfully submitted

LOREN B. MILLER
Petitioner Pro Se
264 Dean Street
Brooklyn, N.Y. 11217

August 15, 1985

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 308 — August Term, 1984

(Argued: November 20, 1984 Decided: February 6, 1985)

Docket No. 84-7452

LOREN B. MILLER, individually and on behalf of all other persons similarly situated,

Plaintiff-Appellant,

—against—

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION,

Defendant-Appellee.

Before:

LUMBARD, MANSFIELD and CARDAMONE, *Circuit Judges.*

Appeal from an order of the Eastern District of New York, I. Leo Glasser, *Judge*, granting summary judgment dismissing an action by an attorney employed by International Telephone and Telegraph Corp., alleging that his employment was terminated in violation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (1982). The complaint was dismissed as time-barred after rejection of claims that the statutory period was tolled by the plaintiff's unawareness of the employer's age discrimination and by the continuing nature of the discrimination.

Affirmed.

LOREN B. MILLER, *Appellant Pro Se.*

DANIEL R. SOLIN, Esq., New York, NY (Solin & Breindel, P.C., New York, NY, Russell G. Tisman, Esq., New York, NY, of counsel), *for Appellee.*

MANSFIELD, *Circuit Judge*:

Loren B. Miller, an attorney and pro se plaintiff, appeals from an order of the Eastern District of New York, I. Leo Glasser, *Judge*, granting summary judgment dismissing as time-barred his complaint claiming that he was discharged by International Telephone and Telegraph Corp. (ITT) because of his age in violation of the Act. We affirm.

In June 1977 Miller, who had been employed by ITT as an attorney on its staff for over 10 years, was told by Howard Aibel, ITT's Senior Vice President and General Counsel, that if he did not improve his performance he would need to find a new job. In February 1978 Aibel advised Miller, after the latter had refused to consider a transfer to ITT's corporate division, that he should start looking for a job outside ITT and plan on leaving his present job within 3 to 6 months, although he could stay on the payroll longer if necessary. According to Miller's sworn testimony, on August 28, 1978, Aibel told him that due to a shortage of departmental funds he would, absent exceptional circumstances, be removed from the payroll on April 1, 1979.[1] On December 1, 1978, he was re-

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[1] When asked whether Aibel had told him that "only the most exceptional circumstances would call for an extension" of his

[Footnote continued on following page]

minded of the April 1 termination date. On March 23, 1979, the proposed termination was approved, on March 30, 1979, Miller was given written notice, and at the end of March he was removed from the payroll.

There followed a broad reorganization of ITT operations and personnel, accompanied by other layoffs. On January 25, 1980, more than 300 days after Miller had received oral and written notification from ITT of its decision to terminate his employment, Miller filed a complaint with the Equal Employment Opportunity Commission (EEOC) claiming that he had been discharged in violation of the ADEA. The complaint listed April 1, 1979, as the "Date Most Recent or Continuing Discrimination Took Place," although it also referred to subsequent terminations by ITT of the employment of others. On March 30, 1981, two years after the date when Miller received written notice of his termination, he filed the present action alleging a continuing violation of the ADEA.

In pretrial depositions Miller testified that as early as June 1977 or sometime in 1978 he was aware that ITT was discriminating against him because of his age in connection with promotional opportunities and that he became aware that he was being discriminated against in connection with his continued employment by ITT "[a]t or about the time I was terminated." Magistrate Shira Scheindlin, in a thoroughly reasoned opinion, recommended that ITT's motion for summary judgment be granted on the ground that the action was time-barred because of

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[Footnote continued from previous page]

date of termination, Miller at his deposition acknowledged that "I think that is probably correct." In his affidavit in support of ITT's motion to dismiss, Aibel confirms having made that statement.

Miller's failure to file his claim with the EEOC within 300 days after receiving notice of termination. In doing so, she rejected his claims that the statute of limitations was tolled and that the violations were continuing ones. Upon review of the issues de novo Judge Glasser granted summary judgment, and he later denied Miller's motion under Fed. R. Civ. P. 59(e) for reconsideration. This appeal followed.

Discussion

Under the ADEA a victim of age discrimination in New York must file his charge with the EEOC within 300 days after the discriminatory action or within 30 days after the end of a state investigation, if earlier.[2] *See* 29 U.S.C. §§ 626(d)(2); 633(b). The 300-day period, in the case of a discriminatory discharge, starts running on the date when the employee receives a definite notice of the termination, not upon his discharge. *See Chardon* v. *Fernandez*, 454 U.S. 6 (1981) (§ 1983 suit); *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980) (Title VII and § 1981 suit); *Pauk* v. *Board of Trustees of City University of New York*, 654 F.2d 856, 858-61 (2d Cir. 1981) (§ 1983 action), *cert. denied*, 455 U.S. 1000 (1982); *Pfister* v. *Allied Corp.*, 539 F. Supp. 224, 225-27 (S.D.N.Y. 1982) (ADEA); *Lutz* v. *Association Films, Inc.*, 552 F. Supp. 985 (S.D.N.Y. 1982) (ADEA). The notice may be oral. *See Aronsen* v. *Crown Zellerbach*, 662 F.2d 584, 594 (9th Cir. 1981), *cert. denied*, 459 U.S. 1200 (1983); *see, e.g., Lutz* v. *Association Films, Inc.*, *supra*, 552 F.2d at 986.

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[2] In states in which there is no agency authorized to investigate allegations of discrimination, potential plaintiffs must file their charges with the EEOC within 180 days of the alleged unlawful practice. Section 626(d)(1).

No action based on a claim of age discrimination may be brought in federal court unless the claim was properly raised with the EEOC, i.e., within the permissible time limit for filing the claim with the EEOC, *Reich* v. *Dow Badische Co.*, 575 F.2d 363, 367-68 (2d Cir.), *cert. denied*, 439 U.S. 1006 (1978); *Smith* v. *American President Lines, Ltd.*, 571 F.2d 102, 107-08 (2d Cir. 1978), and within the scope of the EEOC investigation reasonably expected to grow out of that claim, *id.* at 107 n.10; *Thomas* v. *Resort Health Related Facility*, 539 F. Supp. 630, 642 (E.D.N.Y. 1982). Assuming that a claim has been timely filed with the ADEA and that the federal action is within its scope, an action for non-willful discrimination must be brought within two years after the discriminatory action occurred and a claim for willful discrimination within three years of the action, *see* 29 U.S.C. § 626(e)(1) (1982),[3] but the period is tolled for up to one year for the time during which the EEOC attempts to obtain voluntary compliance with the Act, *see* 29 U.S.C. § 626(e)(2).

The foregoing time periods commence upon the employer's commission of the discriminatory act and are not tolled or delayed pending the employee's realization that the conduct was discriminatory unless the employee was actively misled by his employer, he was prevented in some extraordinary way from exercising his rights, or he asserted his rights in the wrong forum, in which event tolling of the time bar might be permitted as a matter of fairness. *Smith* v. *American President Lines, Ltd., supra*, 571 F.2d at 109. An "extraordinary" circumstance permitting tolling of the time bar on equitable grounds might

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[3] Section 626(e)(i) of the ADEA explicitly adopts the statute of limitation provisions of the Portal-to-Portal Act, 29 U.S.C. § 255(a) (1982).

exist if the employee could show that it would have been impossible for a reasonably prudent person to learn that his discharge was discriminatory. *Cf., Reeb* v. *Economic Opportunity Atlanta, Inc.*, 516 F.2d 924 (5th Cir. 1975). Moreover, the rulings in *Ricks* and *Chardon* that the time period starts upon the employee's receiving notice of termination are retroactive. The Supreme Court so applied them in those cases. *See also, Pauk, Lutz,* and *Pfister, supra.*

Applying these principles to the present case, Miller testified in his deposition that on August 28, 1978, he received oral notice from Aibel that he would, absent exceptional circumstances, be removed from the payroll on April 1, 1979. This sworn admission, which could not later be contradicted for the purpose of creating an issue of fact, *see Perma Research and Development Co.* v. *Singer Co.*, 410 F.2d 572, 578 (2d Cir. 1969), established that the running of the statute of limitations period was triggered on August 28th. As in *Ricks, supra,* the mere possibility that the decision might be reversed was not enough to label it advisory or ineffective for time-bar purposes. *See, e.g., Coke* v. *General Adjustment Bureau, Inc.*, 616 F.2d 785, 788 (5th Cir. 1980), *vacated on other grounds and reh'g on other grounds,* 640 F.2d 584, 586 & n.2 (5th Cir. 1981). Nor was the oral notice, which was given by ITT's Senior Vice President and General Counsel, ineffective because the company's personnel department had not yet officially voted to approve it by August 28th when it was given. ITT's personnel department was aware of Aibel's August 28th action and Miller conceded both that Aibel advised him to consult that department regarding his efforts to find a new job and that he had done so. Miller's 300 days to file with the EEOC therefore expired more than a half a year before he ac-

tually filed his January 25, 1980 EEOC complaint, and as a result, he forfeited his right to sue under the Act. Moreover, the two-year statute of limitations for filing a complaint alleging a non-willful violation expired on August 28, 1980, seven months before Miller commenced the present action. Even accepting Miller's contention that the statute of limitations did not begin runnng until March 30, 1979, when he received official written notice of termination, his action is still barred, since his EEOC filing occurred 301 days after that date.

Miller, an experienced lawyer, has never alleged that he was unaware of his rights under the ADEA. However, he argues that since his termination was part of an ITT restructuring program that continued through 1982 the statute of limitations did not commence running as to him during the continuance of that program. We disagree. When employees are hired or refused employment pursuant to a continuous practice and policy of discrimination, the commencement of the statute of limitations period may be delayed until the last discriminatory act in furtherance of it, *Association Against Discrimination in Employment, Inc.* v. *City of Bridgeport,* 647 F.2d 256, 274 (2d Cir. 1981), *cert. denied,* 455 U.S. 988 (1982), provided such a continuing violation is clearly asserted both in the EEOC filing and in the complaint. However, a continuing violation may not be based on an employee's having suffered from the effects of an earlier discriminatory act. *Ricks, supra,* 449 U.S. at 257; *United Air Lines, Inc.* v. *Evans,* 431 U.S. 553, 558 (1977). Thus, several courts have held that an employee who has been discharged pursuant to a discriminatory policy may not take advantage of later discriminatory acts against other employees for the purpose of postponing the running of the statutory period as to him on a continuing vio-

lation theory. *Williams* v. *Owens-Illinois, Inc.*, 665 F.2d 918, 924 (9th Cir. 1982), *modified on other grounds*, 28 F.E.P. 1820 (1982), *cert. denied*, 459 U.S. 971 (1982); *Woodburn* v. *LTV Aerospace Corp.*, 531 F.2d 750, 751 (5th Cir. 1976); *Malarkey* v. *Texaco Inc.*, 559 F. Supp. 117, 120-21 (S.D.N.Y. 1982), *aff'd on other grounds*, 704 F.2d 674 (2d Cir. 1983). We need not resolve that issue in the present case, however, for the reason that Miller did not assert in his EEOC complaint as the basis of his action a continuing violation extending beyond his discharge; on the contrary, he listed "April 1, 1979" as the date of the most recent violation in his signed charge filed with the EEOC. There was therefore no reason for the EEOC to investigate a continuing violation running beyond that date. Since, according to his own filed claim, the conduct that injured him occurred at the time when he was discharged he cannot now allege later terminations of others as a continuing violation as to him, and the existence of terminations post-dating his own would not serve to delay the running of the statutory period as to him. *See Woodbury* v. *LTV Aerospace Corp.*, *supra*, 531 F.2d at 751; *Schroeder* v. *Dayton-Hudson Corp.*, 448 F. Supp. 910, 913 (E.D. Mich. 1977), *reh'g granted on other grounds*, 456 F. Supp. 650 (E.D. Mich. 1978).

Miller next contends that ITT engaged in a continuing violation as to him by the refusal of its subsidiaries to rehire him at a point within the stautory period. His employement applications to FEC and Sheraton Corporation were made in 1978 and 1979 and a second such application to FEC was made in January 1980, after his termination by ITT and within 300 days of the date he filed his claim with the EEOC. This contention must be rejected because no such claim of failure to rehire was made in Miller's EEOC complaint. *See Lawson* v. *Bur-*

lington Indus., Inc., 683 F.2d 862, 863-64 (4th Cir.), *cert. denied*, 459 U.S. 944 (1982) (charge of illegal layoff does not encompass failure to rehire); *Reich* v. *New York Hospital*, 513 F. Supp. 854, 859 (S.D.N.Y. 1981) (refusal to reinstate is separate claim from dismissal). Absent the filing of such a claim with the EEOC it could not become the basis of the present action. Moreover, since the claims are separable, the new claim of failure to rehire would not in any event delay the running of the time period as to the earlier claim of discriminatory discharge. *See Charlier* v. *S.C. Johnson & Son, Inc.*, 556 F.2d 761, 765-66 (5th Cir. 1977); *Lawson* v. *Burlington Indus., Inc., supra*, 683 F.2d at 863-64. There would be no reason for the EEOC to investigate the failure to rehire in connection with the claim of alleged discriminatory discharge unless the former were asserted as part of that claim, which it was not. The purpose of the notice provision, which is to encourage settlement of discrimination disputes through conciliation and voluntary compliance, would be defeated if a complainant could litigate a claim not previously presented to and investigated by the EEOC.

Finally we find no basis for an extension of the filing period as to Miller on equitable grounds. *See Smith* v. *American President Lines, Ltd.*, 571 F.2d 102, 109-11 (2d Cir. 1978). He is not an uneducated person unfamiliar with the law but a well-educated lawyer engaged in practice in New York.[4] There is no evidence that he

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[4] *See, e.g., Pfister* v. *Allied Corp., supra*, 539 F. Supp. at 227 (noting that plaintiff's claim to equitable tolling is particularly weak since he "is an experienced attorney who may be expected to know of the perils of untimely filing"); *cf. also Smith* v. *American President Lines, Ltd., supra*, 571 F.2d at 109-10 (noting, as

[Footnote continued on following page]

was misled or prevented from filing a timely claim with the EEOC. He testified to his awareness as early as 1977 of ITT age discrimination. The Act's policy against assertion of late claims must therefore be enforced.

We find no merit in Miller's claim that Judge Glasser committed error in refusing to vacate a protective order issued by Magistrate Scheindlin in June 1982, which barred disclosure by Miller of personnel files obtained during discovery.

The order of the district court is affirmed.

[Footnote continued from previous page]

a reason for rejecting equitable tolling, the fact that plaintiff was represented by counsel at an early stage and "had access to a means of acquiring knowledge of his rights and responsibilities . . . well within the 300 day period").

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 18th day of April one thousand nine hundred and eighty-five.

LOREN B. MILLER, individually and on behalf of all other persons similarly situated,

Plaintiff-Appellant,

against

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION,

Defendant-Appellee.

No. 84-7452

[Date stamped:]
[Apr 18 1985]

A petition for rehearing containing a

suggestion that the action be rehead in banc having been filed herein by Attorney-Pro Se, Loren B. Miller.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been tran smitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

[signature]

Elaine B. Goldsmith
Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

LOREN B. MILLER,
Plaintiff,

-against- 81 Civ. 0958

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION,
Defendant.

MEMORANDUM AND ORDER

GLASSER, United States District Judge:

The plaintiff, an attorney formerly employed by the defendant, commenced this action alleging that he was discriminated against in his employment in that he was discharged because of his age in violation of 29 U.S.C. §621 et seq. (1976) and Supp. V. 1981), The Age Discrimination in Employment Act (ADEA). The defendant moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6) or, in the alternative, for summary judgment pursuant to Rule 56 of the Fed. R. Civ. P. The motions were

referred to a Magistrate for hearing and recommendations for the disposition thereof in accordance with 28 U.S.C. §636(b)(1)(B). Written objections to the Magistrate Report and Recommendations were filed by the plaintiff making it incumbent upon the Court to make a de novo determination of those portions of the report to which objections were made.

Because matters outside the pleadings were presented and considered, the motion will be deemed as one for summary judgment. Geisler v. Petrocelli, 616 F.2d 636, 640 (2nd Cir. 1980). The motion is predicated upon the late filing of the charge with the Equal Employment Opportunity Commission (EEOC), which, in New York, must be filed within 300 days of the

alleged unlawful practice and the late filing of the judicial complaint which must be filed within two years for a claimed non-willful and three years for a claimed willful violation of the Act. 29 U.S.C. §626(d)(2), 626(e). The administrative and judicial filing requirements are both measured from the occurrence of the discriminatory act. Th e plaintiff has alleged willful and non-willful violations of the ADEA.

I.

Factual Background

In June 1977, the plaintiff was advised by the defendant's general counsel that he had one year to improve his performance which was characterized as unsatisfactory, or face termination. On February 10, 1978 the plaintiff was informed that he should seek other employment. In August 1978, the plaintiff was informed that his employ-

ment would end on April 1, 1979, barring exceptional circumstances. He thereafter was notified in writing on March 30, 1979 that he was terminated and his employment ceased the next day, March 31, 1979.

On January 25, 1980 the plaintiff filed his complaint with the EEOC and with the New York State Division of Human Rights. That was 301 days after he received written notice of termination. On March 30, 1981, he commenced this action -- two years to the day from the date he received written notification of termination.

II.

Contention of the Parties

A. Defendant's Contentions

The defendant contends that plaintiff's employment was terminated upon receiving the oral notification of February and August 1978. Even if, however, his termination is computed from the date of written

notice on March 30, 1979, more than 300 days elapsed by January 25, 1980, when plaintiff filed his complaint with the EEOC.

If, as defendant contends, the plaintiff's employment terminated in February 1978, then more than three years elapsed before he filed his complaint in this Court and he is time-barred whether his charge is viewed as one for willful or non-willful violation of the Act.

B. Plaintiff's Contentions

Plaintiff argues that the limitation period commenc ed in late 1979 or early 1980 because his termination was part of a continuing pattern or practice of discrimination. That argument is based upon the refusal of Federal Electric Corporation (FEC), an ITT subsidiary, to rehire him in January or February 1980, a refusal which he charges to ITT.

The plaintiff also argues that because ITT allegedly terminated employees on account of age after he was terminated as part of a "restructuring program," there was a continuing violation of the Act by ITT. Measured either from the date he was not rehired or when the last employee was terminated as part of the "restructuring program," he contends, his complaints were timely.

The plaintiff also argues that he first learned that his termination was discriminatory in January 1980 and that his cause of action did not accrue until that time and is, therefore, not time barred.

III.

The Magistrate's Report and Recommendation

The Magistrate made the following recommendations:

A. Plaintiff's Cause of Action Accrued on August 28, 1978.

Plaintiff's cause of action accrued when he received notice of termination on August 28, 1978. He filed his complaint with the EEOC on January 25, 1980, more than 300 days after August 28, 1978 and his claim is, therefore, time-barred. Having failed to file a timely administrative charge with the EEOC, the plaintiff has lost his right to pursue his remedy under the ADEA whether the violation he charges was willful or non-willful.

1. The Plaintiff's Objections To This Recommendation Are:

(a) There is no indication that Howard J. Aibel, General Counsel, who notified plaintiff of his termination on August 28, 1978, had prior approval of the Personnel Department of ITT to do so and, therefore, it was not an official notice given on behalf of ITT.

(b) Aibel's statement was neither

intended nor understood as a termination notice nor was it styled as such. It was, instead, advisory and designed to induce the plaintiff to resign.

(c) If termination was officially decided upon by the defendant in August, 1978, it had to be for cause which was not stated.

(d) Aibel did not notify the defendant's Personnel Department of his action and since notice was again given on March 30, 1979, it would signify plaintiff contends, that it did not regard notice as having been given at any prior time.

(e) A letter dated March 10, 1980 from ITT attorney B. McLanahan to the New York State Division of Human Rights stated that plaintiff "was notified at the end of February that his active employment would terminate March 31, 1979."

2. The Court's Determination

After a de novo review of the proceedings, the Court's determinations of the objections raised by the plaintiff are as follows. The sub-paragraphs that follow will conform to similarly designated sub-paragraphs above in which the plaintiff's objections are summarized.

(a) The assertion that Aibel, a Senior Vice President and General Counsel of ITT, required prior approval of the defendant-s Personnel Department to make effective his notice of termination to the plaintiff does not appear to have been made before (unless the questions and answers on lines 11-23 on page 65 of the plaintiff's deposition may be so construed). Assuming that such approval is required (see ITT Personnel Guide No. 15.0 dated 10/18/74), Mr. Aibel;s Memorandum to the file in reference to the plaintiff

dated February 24, 1978 would support the conclusion that the Personnel Department was aware of the notification and would ratify personnel decisions made by the General Counsel affecting members of his staff. I find, therefore, this objection, even if timely raised at this stage of the proceeding, to be without merit.

(b) The questions and answers on page 67 at lines 10-14 of the plaintiff's deposition, without more, would establish that his objections stated in A(1)(b) above hav e no merit and I so find.

(c) The objection stated in this parallel-designated paragraph abov e also does not appear to have been made before in opposition to the motion. To assert that he was unaware that his termination was attributable to his performance is disingenuous. See, e.g., Aibel Memorandum to File, dated February 24, 1978; Letter

dated March 10, 1980 from Bruce McLanahan to New York State Division of Human Rights annexed to plaintiff's affidavit of September 16, 1982 as Exhibit 6; Memorandum to the File by H.A. Steinke, Jr. regarding performance of the plaintiff, dated June 7 1977 and annexed to Mr. Steinke's Affidavit of August 19, 1982 as Exhibit A. I find this objection to be without merit.

(d) and (e) I find the objections in parallel-designated paragraphs (d) and (e) above have no significance as regards the date on which notice of termination was given to the plaintiff and therefore without merit.

Conclusions of Law

The plaintiff knew on August 28, 1978 that his employment would be terminated by April 1, 1979. The decision to terminate was clearly communicated to him on that date. The defendant should not be faulted

as plaitiff suggests (Plaintiff's Objections, p. 4), for correctly anticipating the decision of the United States Supreme Court in Delaware State College v. Ricks, 449 U.S. 250, 258-59 (1980). See also Pauk v. Board of Trustees of City University of New York, 654 F.2d 856 (2nd Cir. 1981), cert. denied, 455 U.S. 1000 (1982); Chardon v. Fernandez, 454 U.S. 6 (1981). Computing the relevant time periods as of August 28, 1978, the plaintiff's charge of discrimination filed with the EEOC on January 25, 1980, more than 300 days later, is barred.

The time within which plaintiff could have filed a complaint in this Court expired on August 28, 1980. His complaint was filed on March 30, 1981 and is also b arred b y the two year statute of limitations applicable here. 29 U.S.C. §626(e). Although the time within which a complaint

alleging a willful violation of the ADEA is three years, August 25, 1981 in this case, the timely filing of a charge with the EEOC is a necessary condition precedent which was not satisfied. Reich v. Dow Badische Co., 575 F.2d 363, 367-368 (2nd 1978), cert. denied., 439 U.S. 1006 (1978).

B. Plaintiff Has Not Alleged A Continuing Violation That Would Extend the Statutory Limitations.

The Magistrate's report found that the plaintiff did not make known to the EEOC his allegations of continuing violation and raises those allegations for the first time in this action. Those allegations are that the defendant's failure to rehire him and defendant's continued termination of employees pursuant to a "Restructuring Program" gave rise to a continuing violation which extended the statute of limitations. Based upon that finding, the

Magistrate concluded that those allegations cannot be asserted here because the plaintiff's action is limited to the matters charged in the EEOC complaint and to the investigation which can reasonably be expected to grow out of those charges.

The Magistrate also concluded that even if the EEOC charge would permit an allegation of failure to re-hire here, that failure would not give rise to a continuing violation. The same result would be reached as concerns his allegations of continued termination pursuant to a "Restructuring Program."

1. The Plaintiff's Objections:

The plaintiff's objections to this recommendation of the Magistrate is addressed to the factual premise upon which that recommendation is bottomed, namely, that the only act of discrimination alleged in his charge before the EEOC is his wrong-

ful discharge and to the conclusions which flow from that premise.

2. The Court's Determination

I have read the complaint filed with the EEOC by the plaintiff on January 25, 1980 and found no mention made of the defendant's failure to rehire him. The breadth of the plaintiff's claim in this Court cannot extend beyond the matters alleged in the EEOC charge and the investigation which one could reasonably anticipate would follow from that charge. Smith v. American President Lines, Ltd., 571 F.2d 102, 107 (2nd Cir. 1978); Sanchez v. Standard Brands, Inc., 431 F.2d 455, 466 (5th Cir. 1970); Thomas v. Resort Health Resort Related Facility, 539 F. Supp. 630, 642 (E.D.N.Y. 1982).

The plaintiff's allegations in this proceeding of failure to rehire and a subsequent termination of others by the de-

fendant pursuant to a "Restructuring Program are not reasonably related to his discrimination claim before the EEOC even if that claim were liberally read. In any event, a failure to rehire would not give rise to a continuing violation that would permit extending the plaintiff's time to file his complaint here. Charlier v. S.C. Johnson & Son, Inc., 556 F.2d 761, 765-766 (5th Cir. 1977); Benima v. Smithsonian Institute, 471 F. Supp. 62, 65 (D. Mass. 1979); see also United Airlines, Inc. v. Evans, 431 U.S. 553 (1977).

The plaintiff's objection as it relates to his assertion of a continuing violation based on subsequent terminations pursuant to a "Restructuring Program" can only be characterized as an after-thought. The plaintiff is a lawyer who has a superior command of language and who writes with clarity and precision. An examination of

his complaint filed with the EEOC shows that in the space captioned "Date most recent or continuing discrimination took place" he stated, "April 1, 1979." In the next space, calling for "the particulars," after making reference to the termination of others, he concludes: "In these actions in 1979, as on prior occasions, ITT has followed a pattern or practice of age discrimination . . . ." (emphasis added). After a review de novo, I am in complete agreement with the Magistrate's conclusion that the discrimination of which the plaintiff complained was his wrongful discharge on April 1, 1979. In addition, after a review of the authorities cited in the Magistrate's report on pages 24-26, I find that in any event, the termination of other employees after March 30, 1979, when the plaintiff's employment ended, can not inure to the plaintiff's

benefit by extending time limitations that were binding upon him.

I have reviewed the plaintiff's objection to the recommendation of the Magistrate that there are no equitable grounds for tolling the statute of limitations. The factors to be considered in determining whether a limitations period should be tolled on equitable grounds are set out in Smith v. American President Lines, Ltd., 571 F.2d at 109. Those factors are: (1) has the defendant actively misled the plaintiff; (2) has the plaintiff been prevented from asserting his rights in some extraordinary way; or (3) has the plaintiff asserted the correct claim but in the wrong forum. None of those factors are present in this case and the plaintiff's objection in this regard is rejected.

The plaintiff objects to the Magis' trate's report as to the time when he had

knowledge of discrimination. I hav e reviewed pages 513, 530, 521 and 524 of the plaintiff's deposition and find the plaintiff's assertion that he did not know of discrimination until January 1980 to be incredible in the light of his responses to specific questions put to him and that are reflected on those pages.

Finally, the plaintiff objects to the Magistrate's recommendation that his pendent state claims be dismissed. His objections were elaborated in an addendum to his original submission of objections. After a review of the bases advanced by the plaintiff to support these objections, I find them to be without merit. His action here is plainly barred by New York Executive Law §297(9)(McKinney, 1982). Since I have concluded that the defendant's motion for summary judgment should be granted, I can, in any event, see no

justification for retaining jurisdiction of the state claims, however the plaintiff may ultimately choose to describe them, as sounding either in contract, tort (named or unnamed) or in some other theory. United Mine Workers v. Gibbs, 383 U.S. 715 (1966).

Conclusion

I have reviewed the pleadings and the matters outside the pleadings which were presented. I have reviewed the Magistrate's Report and Recommendations and the plaintiff's objections thereto together with the memoranda in support of and opposed to those objections. Based upon that review, I find that:

1. The plaintiff was notified of his termination and knew that his termination was motivated by age discrimination on August 28, 1978;

2. The time within which the plain-

tiff was required to file a discrimination charge with the EEOC expired 300 days after August 28, 1978;

3. The plaintiff filed such a charge on January 25,1980, more than 300 days after that date;

4. The complaint in this action was filed on March 30, 1981;

5. The two year statute of limitations for filing a complaint alleging a non-willful violation of the ADEA expired on August 28, 1980;

6. A cause of action for a willful violation of the ADEA, although governed by a three year statute of limitations is precluded by a failure to timely file the charge with the EEOC, which is a jurisdictional prerequisite;

7. There is no genuine issue as to any material fact with respect to any of the foregoing.

The defendant's motion for summary judgment is, therefore, granted and this determination is made de novo in accordance with 28 U.S.C. §636(b)(1)(B).

Dated: Brooklyn, New York
November 8th, 1983

SO ORDERED,

[signature:
I. Leo Glasser
United States
District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

LOREN B. MILLER,
Plaintiff,

-against- 81 Civ. 0958

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION,
Defendant.

MEMORANDUM AND ORDER

GLASSER, United States District Judge:

The plaintiff has moved, pursuant to Rule 59(e) of the Fed.R.Civ.P., for an order that would alter the judgment of this court entered on November 23, 1983 which granted summary judgment for the defendant and dismissed the plaintiff's complaint.

The defendant's motion for summary judgment was initially referred to Magistrate Scheindlin to hear and recommend. The Magistrate recommended that the motion for summary judgment be granted in a comprehensive report which meticulously anal-

yzed the record before her and thoroughly reviewed the law. Written objections to that report were timely filed by the plaintiff and a de novo determination was made by the court of those portions of the report to which objections were made, pursuant to 28 U.S.C. §636(b)(1)(B) and summary judgment was granted.

The plaintiff's Rule 59(e) motion is addressed to the sound discretion of the court. McCarth v. Manson, 714 F.2d 234, 237 (2nd Cir. 1983). Due consideration has been given to the memoranda of law submitted by the parties and to their respective contentions in support of and in opposition to the motion which is hereby denied for the reason that the court's attention has not been directed to any significant facts or principles of law which would dictate that the judgment previously entered should be altered or amended.

The plaintiff has also requested that a protective order of confidentiality issued upon the defendant's application by Magistrate Scheindlin on June 29, 1982 be vacated in its entirety. This request is made approximately 18 months after the issuance of the protective order by the Magistrate.

Rule 7 of the Rules for Proceedings Before Magistrates in th e United States District Courts for the Southern and Eastern Districts of New York provides that a party shall have 10 days within which to serve on the opposing party and to file with the Magistrate and the Judge to whom the case has been assigned written objections to any determination made by the Magistrate pursuant to 28 U.S.C. §636(b)(1)(A). The order from which relief is sought was clearly a determination made by the Magistrate pursuant to that statute

and the plaintiff's objection to that determination made nearly a year and a half later is, therefore, time barred.

It is interesting to note that no time limitation is expressly stated in 28 U.S.C. §636(b)(1)(B) which provides that "A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the Magistrate's Order is clearly erroneous or contrary to law." Cf. 28 U.S.C. §636(b)(1)(C). Assuming that the plaintiff's request were to be maintained, he has failed to satisfactorily establish that the Magistrate's Order was clearly erroneous or contrary to law. See Wright & Miller, Federal Practice and Procedure: Civil §2036.

Finally, the defendant, by letter dated December 5, 1983, and filed in the Clerk's office on December 6, 1983, takes exception to the costs taxed by the Clerk inci-

dent to the granting of the motion for summary judgment. Rule 54(d) of the Fed.R.Civ.P. provides that costs shall be allowed as of course tc the prevailing party and may be taxed by the Clerk on one day's notice. The action of the Clerk may be reviewed by the court on motion served within 5 days thereafter.

The costs were taxed by the Clerk on Novem ber 28, 1983. The plaintiff advised the court, also by letter, dated December 9, 1983, that he received the defendant's letter request for review on December 8, 1982. A computation of the 5 day limitation of Rule 54(d) made as prescribed by Rule 6(a) of the Fed.R.Civ.P. would require that the motion to review the action of the Clerk have been served on or before December 5, 1983. That was not done. The five-day limitation of Rule 54(d) is not jurisdictional and that period may be en-

larged pursuant to Rule 6(b). United States v. Kolesar, 313 F.2d 835, 837 (5th Cir. 1963); Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d §2679 at pp. 394-395. A motion to enlarge the time as required by Rule 6(B) was not made. The defendant's letter request for review of the costs taxed by the Clerk, is therefore, dismissed. See also, 6 Moore's Federal Practice ¶54.77[9] at p. 1755 (". . . the motion for review should be served within 5 days after the taxation of costs by the clerk. This 5-day period is subject to enlargement under Rule 6(b), but if the period is not enlarged and the motion is untimely it will usually be dismissed or overruled").

Dated: Brooklyn, New York
April 11th, 1984

SO ORDERED,

[I. Leo Glasser]

SOLIN & BREINDEL
Attorneys at Law
501 Fifth Avenue
New York, New York 10017

June 17, 1982

BY HAND

Honorable Shira A. Scheindlin
United States Magistrate
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York

Re: Miller v. International Telephone and Telegraph Corporation
CV-81-0958 (ILG)

Dear Magistrate Scheindlin:

Pursuant to Your Honor's direction, enclosed please find a proposed Order of Confidentiality. Please note that the proposal is a limited one and that its scope extends only to discovery relating to the employment status or evaluations of employees or former employees of ITT along with ITT's restructuring program.

The proposal provides that plaintiff is,

course, free to use all discovery for motions, trial and appeal of this action. In addition, the plaintiff is permitted to disclose the information to experts retained by him or to attorneys consulted by him, provided that such experts or attorneys execute a copy of the order.

Accordingly, defendant respectfully requests that Your Honor sign the proposed Order.

Respectfully,

[signature]

Mark L. Weyman

MLW:vf
Enc.
cc: Loren B. Miller, Esq. (By Hand and with enc.)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

LOREN B. MILLER, Individually and on behalf of all other persons similarly situated,

Plaintiff,

-against-

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION,

Defendant.

ORDER

CV-81-0958 (ILG)

WHEREAS, this Court has ordered that the defendant provide discovery regarding the individual personnel files of its employees and former employees and its confidential restructuring program, and

WHEREAS the information sought by plaintiff is confidential and should not be disclosed unnecessarily, it is

ORDERED, that plaintiff or any counsel retained by him shall not in any manner, directly or indirectly, transfer the documents produced by the defendant in this litigation, or the transcript of testimony

taken in this litigation, of the defendant or its present or former officers, agents or employees or communicate orally or in writing the contents of such documents or testimony, with respect to the employment status or evaluations of that status [or the terms of employment of employees or former] of employees or former employees of International Telephone and Telegraph Corporation other than the plaintiff in this action, or any of the documents or testimony regarding defendant's restructuring program, to any individual, corporation, partnership or entity whatsoever, except that the information may be disclosed to experts retained by plaintiff in connection with this matter, or attorneys consulted by plaintiff inthis matter, provided that such experts or attorneys will execute a copy of this order thereby agreeing that they will not disclose

the information in the documents or testimony to anyone else and except that the documents and transcripts with respect to the employment status or evaluation of that status [or terms of employment] of employees or former employees of the International Telephone and Telegraph Corporation and with respect to defendant's restructuring program may be used for deposition, other pre-trial discovery motions, trial and appeal of this action.

SO ORDERED.

Dated: Brooklyn, New York
June 29, 1982

[signature]

Shira A. Scheindlin
United States
Magistrate

(Text added [deleted] by Magistrate)

FIRST AMENDMENT TO THE
CONSTITUTION OF THE UNITED STATES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacably to assemple, and to petition the Government for a redress of grievances.

29 U.S.C. §626(d(

No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Commission. Such a charge shall be filed --

(1) within 180 days after the unlawful practice occurred; or

(2) in a case to which section 633(b) of this title applies, with-300 days after the alleged unlawful

practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier. Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

29 U.S.C. §627

Every employer, employment agency, and labor organization shall post and keep posted in conspicuous places upon its premises a notice to be prepared or approved by the Commission setting forth information as the Commission deems appropriate to effectuate the purposes of this chapter.